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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
)ERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	DOCKET FILE COPY ORIGINAL IB Docket No. 04-112
Reporting Requirements for U.S. Providers of	)	
International Telecommunications Services	)	
	)	
Amendment of Part 43 of the Commission's	)	
Rules	)	

MOTION FOR LEAVE TO FILE REPLY COMMENTS ONE DAY LATE

The law firm of Kelley Drye & Warren LLP ("Kelley Drye") hereby respectfully requests leave to submit the attached reply comments in the above-captioned proceeding one day after the filing deadline. These reply comments were prepared for timely filing by the firm's regular outside courier service yesterday afternoon, but they were not filed with the Commission due to an oversight by the courier service. Kelley Drye did not learn until today that the reply comments were not filed yesterday. Kelley Drye submits that no party would be prejudiced if these reply comments, which were sent to the service list yesterday by U.S. mail, are accepted for filing today. Should the Commission decide not to accept the filing of these reply comments one day after the filing deadline, we respectfully request that they be accepted for filing as informal comments in the above-captioned proceeding.

Respectfully submitted,

By: ______________________

Robert J. Aamoth
KELLEY DRYE & WARREN LLP
1200 19th Street, NW, Suite 500
Washington, D.C. 20036
(202) 955-9600

Dated: August 24, 2004

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CERTIFICATE OF SERVICE

I, Theresa A. Baum, hereby certify that on this 24th day of August, 2004, the foregoing Motion for Leave to File Reply Comments One Day Late and the attached Reply Comments of Kelley Drye & Warren LLP were served upon the following parties via first-class mail, postage prepaid, or by hand delivery(*) as indicated below:

Theresa A. Baum

James Ball, Chief*
Policy Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Alan I. Feldman, Acting Chief*
Industry Analysis and Technology Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

David Krech, Senior Legal Advisor*
Policy Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

John F. Copes, Attorney*
Policy Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Linda D. Blake, Public Utilities Specialist*
Industry Analysis and Technology Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

James Lande, Economist*
Industry Analysis Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Qualex International*
445 12th Street, S.W.
Washington, D.C. 20554

David G. Richards
J.R. Carbonell
Carol L. Tacker
CINGULAR WIRELESS LLC
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342

Leslie V. Owsley
VERIZON
1515 N. Courthouse Road
Suite 500
Arlington, VA 22201-2909

Nancy J. Victory
Jennifer D. Hindin
Ann E. Broeker
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006

Karis A. Hastings
HOGAN & HARTSON L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004

Nancy J. Eskenazi
Vice President & General Counsel
SES AMERICOM, Inc.
Four Research Way
Princeton, NJ 08540

Joseph A. Godles
GOLDBERG, GODLES, WIENER & WRIGHT
1229 19th Street, N.W.
Washington, D.C. 20036

Kalpak Gude
Vice President & Associate General Counsel
PANAMSAT CORPORATION
1801 K Street, N.W., Suite 440
Washington, D.C. 20006

David A. Nall
Marybeth Banks
SPRINT CORPORATION
401 9th Street, N.W., Suite 400
Washington, D.C. 20004

Scott A. Shefferman
MCI, Inc.
1133 19th Street, N.W.
Washington, D.C. 20036

Leonard J. Cali
Lawrence J. Lafaro
James J. R. Talbot
AT&T CORP.
1120 20th Street, N.W.
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	)	
Amendment of Part 43 of the Commission's Rules	)	

REPLY COMMENTS OF KELLEY DRYE & WARREN LLP

The law firm of Kelley Drye & Warren LLP ("Kelley Drye") hereby submits reply comments in response to the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") released in the above-captioned proceeding on April 12, 2004. In submitting these comments, Kelley Drye is representing the interests of certain specific facilities-based and resale U.S. international carrier clients who submit annual, and in some cases quarterly, reports to the Commission, and who pay various FCC-established regulatory fees, including the international bearer circuits fee.

First, Kelley Drye supports the Commission's proposal (*NPRM* at ¶ 59) to eliminate the annual circuit-addition reports that carriers engaged in private line resale are required to file under Section 63.23(e). It is burdensome for resale carriers to file these reports, and the information contained in them does not materially assist the Commission in the performance of its responsibilities. Similarly, Kelley Drye supports the proposed elimination (*NPRM* at ¶¶ 55-57) of the quarterly reports that foreign-affiliated carriers must file on dominant routes pursuant to Section 43.61(c) for IMTS resale services. These quarterly reports impose a production burden that far exceeds the usefulness of the information to the Commission. The Commission has now received these reports for several years, and we submit that they have not shown themselves to be essential to detect or prevent anti-competitive or any unreasonably discriminatory behavior by the filing carriers.

Second, Kelley Drye respectfully requests that the Commission withdraw or defer its proposal (*NPRM* at ¶ 74) to modify the definition of a "facilities-based" service for purposes of international carrier reporting under Part 43 and international service authorizations under Part 63. As the Commission notes earlier in the *NPRM* (at ¶ 58), the governing definition of a facilities-based service affects the Section 43.82 circuit status reports filed by U.S. international carriers, and those reports are used by the Commission "to implement the requirement in section 9 of the Communications Act that carriers pay annual regulatory fees for each of the bearer circuits they own." Hence, the definition of a facilities-based service can affect the international bearer circuit fees that U.S. international carriers pay annually.

The *NPRM* notes (at ¶ 74) that the current definition of "facilities-based" in Section 63.09(a), which applies to a "leasehold interest in bare capacity," may be confusing because the term "bare capacity" is not defined. The Commission proposes to clarify that the "facilities-based" definition applies to circuits that are leased from another carrier "other than a lease of private line capacity." Later in the same paragraph, the Commission describes the proposed clarification somewhat differently by using the phrase "other than the lease of a private line circuit from another reporting carrier." In the proposed revision to Section 63.09(a), the Commission uses the phrase "other than a lease of a private line circuit from another common carrier."

The Commission should withdraw or defer this proposed clarification because the term "private line circuit," when used in this specific context, is no less ambiguous than the current reference to a leasehold interest in "bare capacity." In particular, the Commission's rules do not define the term "private line circuit," and the Commission's references to "private lines" in its rules and decisions cannot easily be reduced to a single detailed definition. Moreover, it is not clearly apparent from the term "private line circuit" whether and how that term would apply to the various types of international capacity arrangements that are pervasive in the market today. Indeed, the description of a service as a "private line" is itself the product of a largely bygone era in the telecommunications industry. The result is that this term is used less frequently and less consistently in today's industry than was the case twenty or even ten years ago. Hence, replacing the "bare capacity" language with a reference to a "private line circuit" does not, in our view, bring more certainty to the issue of which circuits must be included in Section 43.82 reports and, perhaps more important, which circuits are subject to international bearer circuit fees.

In addition, it is conceivable that the proposed clarification could have the indirect and perhaps inadvertent effect of increasing the international bearer circuit fees that some carriers must pay. The existing formulation is that a carrier does not pay the fee on a leased circuit unless the circuit qualifies as a "leasehold interest in bare capacity." In effect, there is a presumption against payment except for the specified type of leasehold interest. However, under the codified version of the proposed clarification, a carrier would pay the fee on all leased circuits unless they are exempt as a "private line circuit." We are concerned that this could be construed to establish a presumption in favor of payment unless the leasehold interest qualifies as a "private line circuit." By itself, this change in the structure of the rule's application conceivably could result in more leased circuits being subject to the international bearer circuit fee if the proposed clarification is adopted. That result would almost certainly occur if the term "private line circuit" is construed quite narrowly. Hence, in addition to causing confusion, the proposed clarification could entail inadvertently higher fees for certain carriers.

In our view, it is not appropriate to expand the fee obligations of specific carriers through the "back door" of a change in the definition of a "facilities-based" service. In the extremely competitive international telecommunications marketplace, carriers price their capacity products and other services based on an internal assessment of all costs, including any applicable fees. Even a slight increase in the carrier's underlying costs can mean the difference between earning a profit and suffering a loss on the service. In cases where a carrier has entered into a long-term contract with a customer based on a reasonable belief that under the current rules the service is not subject to international bearer circuit fees, it would undermine the carrier's pricing decision, and perhaps force the carrier to provide the service at a loss, if the carrier is now forced to pay international bearer circuit fees on a 64 KBPS basis for the service. Higher-capacity services would be particularly hard-hit by the payment of these fees, which could easily run into the hundreds of thousands of dollars. The Commission should not assume that all carriers have included in their customer contracts a provision that permits them to pass-through to the customer any increases in fees,

Moreover, the proposed clarification creates the prospect that two or more carriers would be regarded as "facilities-based" for the same circuit and, hence, might be required to pay redundant international bearer circuit fees. For example, if Carrier A leases certain capacity from a non-common carrier, and then Carrier B leases the same capacity from Carrier A, the possibility cannot be ruled out that, depending on the scope of the exemption for "private line circuits," both Carrier A and Carrier B would be regarded as facilities-based common carriers and, hence, subject to the international bearer circuit fee requirement for the same underlying capacity. In this scenario, the price of the service to the end user presumably would reflect two fee payments. By contrast, where Carrier A uses this capacity to provide a service directly to an end-user subscriber, the price to the end-user in this same scenario presumably would reflect only one fee payment. In effect, the first provisioning arrangement would be penalized through a double assessment of fees, even though it may afford certain commercial or operational efficiencies, while the second provisioning arrangement would receive a competitive advantage from having to pay the fee only once. In Kelley Drye's view, the Commission should strive to avoid penalizing specific serving configurations or otherwise affecting competitive marketplace conditions through the imposition of international bearer circuit fees. While the Commission can certainly avoid this undesirable result through a broader application of the exemption for a "private line circuit from another common carrier," Kelley Drye remains concerned that the proposed clarification could cause uncertainty and confusion among, and hinder business planning by, telecommunications carriers.

Kelley Drye is not suggesting that the Commission cannot modify the scope or applicability of the current policies governing international bearer circuit fees. However, should the Commission desire to do this, Kelley Drye recommends that the Commission initiate a separate rulemaking where this issue can be squarely addressed by all interested parties and the Commission can make an informed decision based on a full record regarding current industry conditions and practices, as well as the possible impact of rule changes on affected carriers. Unfortunately, this proceeding has not developed a full record on this issue, and Kelley Drye urges the Commission to avoid causing unintended or inadvertent consequences for industry participants by modifying the "facilities-based" definition in ways that might be construed to affect the payment of international bearer circuit fees.

Lastly, in the event the Commission decides to adopt the proposed clarification, Kelley Drye requests that the Commission make clear that the new definition is not intended to, and does not, expand the number of carriers who must pay the international bearer circuit fee or the circuits that are subject to such fees. In addition, Kelley Drye would request that the Commission clarify that the provision of any services involves at most one "facilities-based" U.S. international common carrier, thereby eliminating any possible interpretation of the FCC's rules as classifying two or more carriers as "facilities-based" common carriers in providing a service to an end-user subscriber.

Respectfully submitted,

By: ______________________

Robert J. Aamoth
KELLEY DRYE & WARREN LLP
1200 19th Street, NW, Suite 500
Washington, D.C. 20036
(202) 955-9600

Dated: August 23, 2004

CERTIFICATE OF SERVICE

I, Theresa A. Baum, hereby certify that on this 23rd day of August, 2004, the foregoing Reply Comments of Kelley Drye & Warren LLP was served upon the following parties via first-class mail, postage prepaid, or by hand delivery(*) as indicated below:

Theresa A Baum

Theresa A. Baum

James Ball, Chief*
Policy Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Alan I. Feldman, Acting Chief*
Industry Analysis and Technology Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

David Krech, Senior Legal Advisor*
Policy Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

John F. Copes, Attorney*
Policy Division
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Federal Communications Commission
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Federal Communications Commission
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Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
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Qualex International*
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Suite 1700
Atlanta, GA 30342

Leslie V. Owsley
VERIZON
1515 N. Courthouse Road
Suite 500
Arlington, VA 22201-2909

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Ann E. Broeker
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HOGAN & HARTSON L.L.P.
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Washington, D.C. 20004

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Princeton, NJ 08540

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Vice President & Associate General Counsel
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